

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

RYAN KARNOSKI, et al.,

Plaintiffs,

v.

DONALD J TRUMP, et al.,

Defendants.

CASE NO. C17-1297 MJP

ORDER ON LCR 37 JOINT  
SUBMISSION RE DEFENDANTS  
DELIBERATIVE PROCESS  
PRIVILEGE CLAIMS (DKT. NO.  
497)

The above-entitled Court, having received and reviewed the LCR 37 Joint Submission Regarding Defendants' Deliberative Process Privilege Claims (Dkt. No. 497), along with relevant portions of the record, ORDERS that Plaintiffs' motion to compel Defendants to produce a random sampling of 350 documents for *in camera* review is GRANTED as follows:

- (1) Defendants shall provide Plaintiffs with an updated master privilege log, reflecting an accurate list of withheld documents and privilege assertions by May 22, 2020;
- (2) From the updated master privilege log, Plaintiffs will provide Defendants with a randomized list of 350 documents that were withheld solely on the basis of the deliberative process privilege by May 26, 2020;

- 1 (3) After reviewing the list provided by Plaintiffs, if Defendants find a document that has  
2 been withheld on the basis of more than the deliberative process privilege,  
3 Defendants will remove that document from the sampling. The Plaintiffs may then  
4 substitute another randomized selection for a total of 350;  
5 (4) Defendants shall file the 350 documents for an *in camera* review with the Court by  
6 May 29, 2020.

### 7 Discussion

8 Since May 2018, Plaintiffs have steadily attempted to compel or obtain further  
9 information about the 35,000 to 50,000 documents Defendants have withheld on the basis of the  
10 deliberative process privilege. (See e.g., Dkt. Nos. 245, 364, 398, 408, 440, 445, 469.) When  
11 Defendants recently produced 300 of these previously withheld documents, Plaintiffs found that  
12 for dozens of these documents “no colorable claim of privilege exists.” (Dkt. No. 497 at 2  
13 (citing Dkt. No. 472)). Several of these documents were news reports and post-decisional  
14 explanations of policies that are not subject to the deliberative process privilege. (Dkt. No. 497  
15 at 5.) Other documents contained talking points drafted and disseminated by the Australian and  
16 British Governments over which Defendants—various officials and agencies of the United States  
17 Government—cannot assert the privilege. (Id. at 16.) Because of this and other similar  
18 disclosures, Plaintiffs “have grown increasingly concerned that the Government has been broadly  
19 misapplying the privilege.” (Dkt. No. 497 at 2.)

20 Plaintiffs therefore seek an Order requiring Defendants to submit 350 documents for an  
21 *in camera* review by the Special Master, where the Master will determine whether Defendants  
22 have appropriately asserted the privilege. (Id. at 5.) This random sampling will include  
23 documents withheld solely on the basis of the deliberative process privilege, selected by a  
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1 randomization algorithm available through Plaintiffs' discovery review platform, Relativity.  
2 (Id.)

3 Defendants argue that Plaintiffs have failed to make a showing that the deliberative  
4 process privilege has been misapplied because the privilege was in fact applied correctly over  
5 some of the documents recently released and even if it was not, those documents represent only a  
6 small fraction of the total documents Defendants have withheld in this case. (Id. at 6-13.) But as  
7 Plaintiffs note, the Government does not defend asserting the privilege over eight of the  
8 contested documents; applying even this conceded error rate to the 50,000 documents  
9 Defendants have withheld on the basis of the deliberative process privilege would suggest that  
10 Defendants have erroneously withheld 1,300 documents. (Id. at 16.)

11 Additionally, the Court recently found that Defendants had erroneously asserted the  
12 privilege over hundreds of pages of documents submitted to the Court for *in camera* review at a  
13 much higher error rate than conceded by the Government in the present Motion. (See Dkt. No.  
14 509.) The Court therefore finds that Plaintiffs have raised significant and legitimate concerns  
15 that Defendants are improperly withholding documents where no colorable claim of privilege  
16 exists.

17 Defendants also argue that Plaintiffs' request would circumvent the Ninth Circuit's  
18 administrative stay pending a ruling on Defendants' current Petition for a Writ of Mandamus.  
19 (Id. at 13-15.) Defendants are concerned that if the Court were to review these documents to  
20 determine whether the privilege has been overcome pursuant to the Warner factors it would  
21 violate the Ninth Circuit's administrative stay because the question of whether the Warner  
22 factors permit such disclosure is now pending before the Ninth Circuit. (Dkt. No. 497 at 14.)  
23 But the documents have not been chosen, so the Court cannot determine at this juncture whether  
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1 the sampling will include “‘deliberative documents’ from RFPs Nos. 15 and 29.” (Dkt. No. 497  
2 at 14 (citing Dkt. No. 414-1 (Defendants’ pending Petition for a Writ of Mandamus).)  
3 Defendants’ argument is therefore premature. Further, where Defendants identify documents  
4 responsive to RFP Nos. 15 and 29 and implicated by the Ninth Circuit’s stay, Defendants may  
5 note the documents to Plaintiffs and provide a replacement document for the Court’s *in camera*  
6 review.

### 7 **Conclusion**

8 Finding that Plaintiffs have raised significant and legitimate concerns that Defendants are  
9 improperly withholding documents where no colorable claim of privilege exists, the Court  
10 GRANTS Plaintiffs’ Motion and ORDERS Defendants to produce the random sample of 350  
11 documents to the Court for an *in camera* review by May 29, 2020. Further, Defendants must  
12 provide Plaintiffs with an accurate list of withheld documents and privilege assertions by May  
13 22, 2020 and the Plaintiffs must provide Defendants with the randomized list of 350 documents  
14 by May 26, 2020.

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16 The clerk is ordered to provide copies of this order to all counsel.

17 Dated May 14, 2020.

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20 Marsha J. Pechman  
21 Senior United States District Judge  
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